In The

Supreme Court of the United States

October Term, 1978

No. 78-192

J. JEROME OLITT,

Petitioner,

—against—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF NEW YORK SUPREME COURT

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF NEW YORK SUPREME COURT, FIRST DEPARTMENT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered March 7th, 1978.

OPINION BELOW

The opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (App. A. infra) is reported at 61 A.D.2d 416.

JURISDICTION

The judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, was entered on March 7th, 1978. The Court of Appeals of the State of New York denied petitioner's application to appeal further and dismissed the appeal taken as of right on May 4th, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether, under the rulings in Burford v. Sun Oil Co., 319 U.S. 315, Alabama Public Service Comm'n. v. Southern R. Co., 341 U.S. 341, Willcox v. Consolidated Gas Co., 212 U.S. 19, 40, Louisiana P. & L. Co. v. Thibodaux, 360 U.S. 25, 29, Harrison v. NAACP, 360 U.S. 167, 177, Townsend v. Sain, 372 U.S. 293, 312-319, NAACP v. Button, 371 U.S. 415, Government Employees v. Windsor, 353 U.S. 364 and England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, a litigant, who has properly invoked the jurisdiction of the Federal District Court to consider federal constitutional claims and following the Federal District Court's abstention reserved in the state court his right to return to the Federal District Court for the resolution of his federal constitutional claims, can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims?

2. Whether, under the ruling in Spevack v. Klein, 385 U.S. 511, the Fifth Amendment to the United States Constitution was violated by the use of petitioner's immunized Grand Jury testimony as part of the case in chief against him in the state court attorney disciplinary proceeding?

3. Whether, under the ruling in Palermo v. Warden, Green Haven State Prison, 545 F.2d. 286 (2d. cir. 1976), the "Due Process" clause of the Fourteenth Amendment to the United States Constituion was violated, when an Assistant District Attorney of New York County promised not to refer peitioner's case to the Association of the Bar of the City of New York and the breach of this promise led directly to the commencement of the state court disciplinary proceeding?

4. Whether, under the ruling in Bodie v. Connecticut, 91 Sup. Ct. 780, Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 Sup. Ct. 652, Goldberg v. Kelly, 397 U.S. 254, Snaidach v. Family Finance Corporation, 395 U.S. 337, In re: Winship, 397 U.S. 358 and Armstrong v. Manzo, 380 U.S. 554, the "Due Process" clause of the Fourteenth Amendment to the United States Constitution was violated, when the Assistant District Attorney of New York County's ex-parte application to turn over petitioner's immunized Grand Jury minutes to the Association of the Bar of the City of New York was granted, without the petitioner being given notice of the application or an opportunity to be heard in response thereto?

5. Whether, under the rulings in Barker v. Wingo, 407 U.S. 514, Klopher v. N.C., 386 U.S. 213, Spevack v. Klein, 385 U.S. 511 and Erdmann v. Stevens, 458 F.2d. at 1211, the speedy trial mandate of the Sixth Amendment of the United States Constitution as applied to the states by

the Fourteenth Amendment was violated by the unreasonable and unjustified prosecutorial delay from 1970 to 1973, which resulted in the death of two defense witnesses?

STATEMENT OF FACTS

Petitioner originally appeared before a State Grand Jury in October and November of 1968 and was granted full transactional immunity. Simultaneously, petitioner, whose counsel at this point in time was the same attorney who has represented him in a prior state court disciplinary proceeding, received a promise from the assistant district attorney handling this case that he would not initiate or refer the subject matter of petitioner's testimony to the Committee on Grievances of the Association of the Bar of the City of New York (hereinafter referred to simply as the "Grievance Committee"). Accompanying petitioner's attorney at this time was his law partner.

Thereafter, and on or about December 1st, 1969, the Chief Counsel to the Grievance Committee telephoned the assistant district attorney handling the case and requested the Grand Jury testimony of another attorney who had also testified at the October 1968 Grand Jury. The assistant district attorney volunteered that he had other Grand Jury testimony of another attorney who had been granted full transactional immunity and that he would discuss that with the Chief Counsel to the Grievance Committee at a later date. Thereafter, when the Chief Counsel to the Grievance Committee observed a newspaper article in January of 1970, he "put two and two together", recalling the assistant district attorney's statement, and opened an attorney's card for the appellant on January 30th, 1970.

In February of 1971, the assistant district attorney made an ex-parte application to a state

Supreme Court justice for an order authorizing the release of the minutes of various Grand Juries, inclusive of the Grand Jury at which petitioner had testified, to the Grievance Committee. No notice of this application was given to the petitioner nor was he afforded an opportunity to be heard in opposition thereto. The order was granted in February of 1971.

Thereafter, and in January of 1973, the Grievance Committee notified petitioner of the commencement of its investigation and on May 31st, 1973, it served a charge letter upon him.

At the hearing held before the Grievance Committee on June 21st, 1973, its Chief Counsel presented its charges solely and wholly by resting its case upon the presentation of the transcript of petitioner's immunized Grand Jury testimony.

On March 7th, 1974, after the Grievance Committee recommended that the matter be referred to the Appellate Division, petitioner requested that the previous hearing be set aside by reason of the improper inclusion by the Grievance Committee of prejudicial material in the charge letter. The Grievance Committee granted petitioner's request, and a new hearing was held on May 14th, 1974, which hearing was adjourned for consideration of petitioner's claim that his immunized testimony before the Grand Jury was inadmissible in a disciplinary proceeding.

In June of 1974, petitioner commenced an action in the Federal District Court for a declaratory injunction and injunction against the use of the Grand Jury testimony in the disciplinary proceeding. The dismissal of this action, on abstention grounds, was affirmed by the Second Circuit (515 F.2d. 427) and this Court denied certiorari (423 U.S. 863).

Following the denial of certiorari by this Court in 1975, petitioner returned to the Grievance Committee hearings, where he expressly reserved his right to litigate his federal constitutional questions in the Federal District Court following the resolution of his state issues in the state proceeding.

In his formal answer to the petition for the imposition of discipline presented to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, petitioner again reiterated his express reservation of his right to litigate his federal constitutional questions in the Federal District Court following the resolution of his state issues in the state proceeding.

The Appellate Division appointed a referee to hear and report and specifically directed the referee to consider the effect of the district attorney's promise, if in fact such promise was made [Palermo v. Warden, Green Haven State Prison, 545 F.2d. 286 (2d. Cir. 1976)].

The referee's report (App. C. infra) found petitioner guilty as charged, reported that the Palermo defense was not available to petitioner, and recommended leniency in the imposition of discipline.

The Grievance Committee then moved to confirm the referee's report and for the imposition of discipline. The petitioner cross-moved to stay the imposition of discipline pending petitioner's return to the Federal District Court for the resolution of his federal constitutional issues.

By an order entered March 7th, 1978 (Appendix B, infra), the Appellate Division of the Supreme Court of the State of New York, First

Department, granted the Grievance Committee's motion to confirm the referee's report and suspended the petitioner from the practice of law for three (3) years effective April 7th, 1978. Their opinion is reprinted herein at Appendix A, infra.

On May 4th, 1978, the New York Court of Appeals denied petitioner's application for leave to appeal there and dismissed petitioner's appeal taken as of right.

OPINION OF THE REFEREE

The referee's opinion (App. C., infra), which notes petitioner's express reservation of his right to litigate his federal constitutional questions in the Federal District Court, thereafter ignores and makes no mention of the effect of this reservation of rights; held that the Palermo [Palermo v. Warden, Green Haven State Prison, 545 F.2d. 286 (2d. Cir., 1976)] defense is unavailable to petitioner; ignored and made no mention of the use of petitioner's immunized Grand Jury minutes as a part of the case in chief against him; and held that the "laches" defense was unavailable to petitioner.

OPINION OF THE APPELLATE DIVISION

The opinion (App. B, infra) and order (App. A, infra) of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department adopted the referee's report in toto. It also denied the petitioner's cross-motion to stay the imposition of discipline upon him pending his return to the Federal District Court for the resolution of his federal constitutional questions.

SUMMARY OF THE ARGUMENT

In Erdmann v. Stevens, 485 F.2d. at 1211, the Second Circuit held that while the practice of law is a privilege, once granted, it may not be taken away without due process of law. Erdmann also stands for the principle that attorney disciplinary proceedings are quasi-criminal in nature.

Petitioner received transactional immunity in connection with his testimony before the Grand Jury by a state officer expressly authorized to commence attorney disciplinary proceedings. Furthermore, he was expressly promised that this state officer would not initiate or refer the matter to the Grievance Committee.

For this reason, we respectfully urge that the prosecution of petitioner was barred by virtue of his immunity and further by virtue of the doctrine set down in Palermo v. Warden, Green Haven State Prison, 545 F.2d. 286 (2nd Cir., 1976).

The district attorney's ex-parte application to turn over petitioner's immunized Grand Jury minutes deprived petitioner of notice of application and an opportunity to be heard in opposition thereto [Bodie v. Connecticut, 91 S.Ct. 780; Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 309, 70 S.Ct. 652; Goldberg v. Kelly, 397 U.S. 254; Snaidach v. Family Finance Corporation, 395 U.S. 337; In re: Winship, 397 U.S. 358; Armstrong v. Manzo, 380 U.S. 554]. Such utter lack of due process cannot be countarenced in attorney disciplinary proceedings [Erdmann v. Stevens, supra].

The Grievance Committee received these minutes in February of 1971. Yet they waited until 1973 to notify and charge petitioner with misconduct, a charge eventually heard in June of

1973, at a hearing whereat the Chief Counsel presented the charge solely and wholly by resting its case upon the presentation of the transcript of petitioner's immunized Grand Jury minutes.

The flagrance of these acts so shocked petitioner that he brought suit in the United States District Court for the Southern District of New York, seeking an injunction against the use of the Grand Jury testimony in the disciplinary proceeding. Ultimately, the District Court dismissed on abstention grounds, the Second Circuit affirmed, and this Court denied certiorari.

Petitioner and his counsel took exception to any conclusion that petitioner, who has properly invoked the jurisdiction of the Federal District Court to consider federal constitutional claims and heard that Court postpone such consideration upon abstention grounds, can be compelled through no fault of his own, to accept instead a state court's determination of those claims. Such a result, this Court has held:

> "... would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that 'When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction ... The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.' (Citation omitted) Nor does anything in the abstention doctrine require or support such a result. Absten-

tion is a judge-fashioned vehicle for according appropriate deference to the 'respective competence of the state and federal court systems.' (Citation omitted) Its recognition as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law. (Citation omitted) Accordingly, we have on several occasions explicitly recognized that abstention 'does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise.'

It is true that, after a post-abstention determination and rejection of his federal claims by the state courts, a litigant could seek review in this Court. (Citation omitted) But such review, even when available by appeal rather than only by discretionary writ of certiorari, is an inadequate substitute for the initial District Court determination — often by three judges, 28 U.S.C. §2281 -- to which the litigant is entitled in the federal courts. This is true as to issues of fact. Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims. 'It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.' (Citation omitted) 'There is always in liti-

gation a margin of error, representing error in factfinding ...' (Citation omitted) Thus in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be unwillingly deprived of that determination. (Citation omitted) The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts. We made this clear only last Term in NAACP v. Button, supra, 371 U.S. at 427, when we said that 'a party has the right to return to the District Court, after obtaining the authoritative state court construction for which the court abstained, for a final determination of his claim.'

We also made it clear in Button, however, that a party may elect to forego that right. Our holding in that case was that a judgment of the Virginia Supreme Court of Appeals upon Federal issues submitted to the state tribunals by parties remitted there under the abstention doctrine was 'final' for purposes of our review under 28 U.S.C. §1257. In so determining, we held that the petitioner had elected 'to seek a complete and final adjudication of [its] rights in the state courts' and thus not return to the District Court, and that it had manifested

this election 'by seeking from the Richmond Circuit Court "a binding adjudication" of all its claims and a permanent injunction as well as declaratory relief, by making no reservation to the disposition of the entire case by the state courts, and by coming here directly on certiorari.' 371 U.S. at 427-428. We fashioned the rule recognizing such an election because we saw no inconsistency with the abstention doctrine in allowing a litigant to decide, once the federal court has abstained and compelled him to proceed in the state courts in any event, to abandon his original choice of a federal forum and submit his entire case to the state courts, relying on the opportunity to come here directly if the state decision on his federal claims should go against him. Such a choice by a litigant serves to avoid much of the delay and expense to which application of the abstention doctrine inevitable gives rise; when the choice is voluntarily made, we see no reason why it should not be given effect."

This Court went on to list the specific steps that a litigant must take in order to reserve his federal constitutional claims for adjudication by the Federal Court system:

"In Button, we had no need to determine what steps, if any, short of those taken by the petitioner there would suffice to manifest the election. The instant case, where appellants did

not attempt to come directly to this Court but sought to return to the District Court, requires such a determination. The line drawn should be bright and clear, so that litigants shunted from federal to state courts by application of the abstention doctrine will not be exposed, not only to unusual expense and delay, but also to procedural traps operating to deprive them of their right to a District Court determination of their federal claims. (Citation omitted) It might be argued that nothing short of what was done in Button should suffice -- that a litigant should retain the right to return to the District Court unless he not only litigates his federal claims in the state tribunals but seeks review of the state decisions in this Court. (Citation omitted) But we see no reason why a party, after unreservedly litigating his federal claims in the state courts although not required to do so, should be allowed to ignore the adverse state decision and start all over again in the District Court. Such a rule would not only countenance an unnecessary increase in the length and cost of the litigation; it would also be a potential course of friction between the state and federal judiciaries. We implicitly rejected such a rule in Button, when we stated that a party elects to forego his right to return to the District Court by a decision 'to seek a complete and final adjudication of his rights in the state

courts.' We now explictly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then -- whether or not he seeks direct review of the state decision in this Court -- he has elected to forego his right to return to the District Court.

This rule requires clarification of our decision in Government Employees v. Windsor, 353 U.S. 364, the case referred to by the District Court. The plaintiffs in Windsor had submitted to the state courts only the question whether the state statute they challenged applied to them, and had not 'advanced' or 'presented' to those courts their contentions against the state's constitutionality. We held that 'the bare adjudication by the Alabama Supreme Court that the [appellant] union is subject to this Act does not suffice, since that court was not asked to interpret the statute in light of the constitutional objections presented to the District Court. If appellants' freedom-of-expression and equal-protection arguments had been presented to the state court, it might have construed the statute in a different manner.' 353 U.S. at 366. On oral argument in the instant case, we were advised that appellants' submission of their federal claims to the state courts had been motivated primarily by a belief that Windsor required this.

The District Court likewise thought that under Windsor a party is required to litigate his federal questions in the state courts and 'dare not restrict his state court case to local law issues.' 194 F. Supp., at 522. Others have read Windsor the same way. (Citation omitted) It should not be so read. The case does not mean that a party must litigate his federal claims in the state courts, but only that he must inform those courts what his federal claims are, so that the state statute may be construed 'in light of' those claims. See Note, 73 Harv. L. Rev. 1358, 1364-1956 (1960). Thus mere compliance with Windsor will not support a conclusion, much less create a presumption, that a litigant has freely and without reservation litigated his federal claims in the state courts and so elected not to return to the District Court.

We recognize that in the heat of litigation a party may find it difficult to avoid doing more than is required by Windsor. This would be particularly true in the typical case, such as the instant one, where the state courts are asked to construe a state statute against the backdrop of a federal constitutional challenge. The litigant denying the statute's applicability may be led not merely to state his federal constitutional claim but to argue it, for if he can persuade the state court that application of the statute to him would offend the

Federal Constitution, he will ordinarily have persuaded it that the statute should not be construed as applicable to him. In addition, the parties cannot prevent the state court from rendering a decision on the federal question if it chooses to do so; and even if such a decision is not explicit, a holding that the statute is applicable may arguable imply, in view of the constitutional objections to such a construction, that the court considers the constitutional challenge to be without merit.

Despite these uncertainties arising from application of Windsor -- which decision, we repeat, does not require that federal claims be actually litigated in the state courts -- a party may readily forestall any conclusion that he has elected not to return to the District Court. He may accomplish this by making on the state record the 'reservation to the disposition of the entire case by the state courts' that we referred to in Button. That is, he may inform the state courts that he is exposing his federal claims there only for the purpose of complying with Windsor, and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for the disposition of his federal contentions. Such an explicit reservation is not indispensable; the litigant is in no event to be denied his right to

return to the District Court unless it clearly appears that he voluntarily did more than Windsor required and fully litigated his federal claims in the state courts." [England v. Louisiana State Board of Medical Examiners, 375 U.S. 411]

In footnote 12 at page 421, this Court postulated:

> "It has been suggested that state courtsmay 'take no more pleasure than do federal courts in deciding cases piecemeal ...' and 'probably prefer to determine their questions of law with complete records of cases in which they can enter final judgments before them' Clay v. Sun Ins. Office, 363 U.S. 207, 227 (dissenting opinion). We are confident that state courts, sharing the abstention doctrine's purpose of 'furthering the harmonious relation between state and federal authority', Railroad Comm'n v. Pullman Co., 312 U.S. 496, 501, will respect a litigant's reservation of his federal claims for decision by the federal courts." [England v. Louisiana State Board of Medical Examiners, 375 U.S. at 421]

However, the clear mandate was:

> "When the reservation has been made, however, his right to return will in all events be preserved." [England v. Louisiana State Board of Medical

Examiners, 375 U.S. at 421-422]

Justice Douglas, in his concurring opinion, predicted that England would result in procedural problems [375 U.S. at 435]:

> "The Bar is now told that if one repairs to the state courts and submits the state law question along with the federal constitutional questions, he will be presumed to have elected to pursue the state remedy, unless he makes clear a purpose to return to the federal court when the state court has made its ruling. I gather that, without that reservation, the record will be taken to mean that 'he volunarily litigated his federal claims in the state courts'. Or, if he forgets or fails to make such a reservation, he can still preserve his right to return to the federal court by doing what the Court now says is required of him by Windsor. For he is told today that instead of submitting his federal claims to be 'litigated', he may submit his state law questions only for consideration 'in light of' the federal questions. Those who read this opinion may have adequate warning. But this opinion, like most, will become an obscure one -- little known to the Bar. Lawyers do not keep up with all the nuances of court opinions, especially those touching on an exotic rule of federal procedure as the one which we evolve today. I fear therefore that the rule we announce today will be a veritable trap."

Petitioner did return to the state court, as an involuntary respondent therein, where, at every stage of the proceeding, he expressly reserved his right to return to the Federal District Court to litigate his federal constitutional questions following the resolution of his state issues.

A referee was appointed to hear and report on the charges against petitioner as well as the effect of the district attorney's promise, if in fact such promise was made [Palermo v. Warden, Green Haven State Prison, 545 F.2d. 286 (2nd Cir. (1976)].

The referee groundpetitioner guilty as charged, reported that the Palermo defense was not available to petitioner, noted petitioner's express reservation of his right to litigate his federal constitutional questions in the Federal District Court, ignored the issue of the use of petitioner's immunized Grand Jury testimony against him; held that the "laches" defense was unavailable to petitioner; and recommended leniency in the imposition of discipline.

When the Grievance Committee moved to confirm the referee's report and to impose discipline, petitioner cross-moved to stay the imposition of discipline pending his return to the Federal District Court for the resolution of his federal constitutional issues.

The referee's report was confirmed in all respects, the cross-motion for a stay denied, and petitioner was suspended from the practice of law for three (3) years.

As a result, petitioner has been compelled, through no fault of his own, and following an express reservation of his right to litigate his federal constitutional questions in the Federal District Court, to instead have imposed upon him

the inadequate substitute of a state determination of those claims, with the inherent deprivation to him of a federal trial court's role in constructing a record and making fact findings, which could dictate the decision of federal claims.

This inadequate state court determination permitted petitioner's immunized Grand Jury minutes to be used against him as part of the Grievance Committee's case in chief in violations of petitioner's Fifth Amendment rights; permitted the district attorney to obtain an ex-parte order authorizing the minutes of petitioner's immunized Grand Jury testimony to be turned over to the Grievance Committee in violation of petitioner's Fourteenth Amendment rights; and sanctioned unjustified and prolonged prosecutorial delay in the commencement of the proceeding in violation of petitioner's Sixth Amendment rights.

IMPORTANCE OF THIS PETITION

This petition presents a situation where a state court has decided federal questions of substance not heretofore determined by this Court, and has decided them in a way which is contrary to the applicable decisions of this Court:

1. The state courts usurpation of the Federal District Court's role determining federal constitutional questions, under the circumstances hereinbefore stated, is contrary to the doctrines set down in Government Employees v. Windsor, 353 U.S. 364 and England v. Louisiana State Board of Medical Examiners, 375 U.S. 411. The failure of the state court to stay the impositions of discipline upon the petitioner pending his return to the Federal District Court for resolution of his federal constitutional questions is likewise contrary to this Court's decision in the same cases.

2. The state court's sanction of the use of petitioner's immunized Grand Jury testimony against him as part of the Grievance Committee's case in chief is a federal question not expressly decided by this Court, although contrary to this Court's decisions in Spevack v. Klein, 385 U.S. 511 and Matter of Ruffalo, 20 L.Ed.2d. 1436.

3. The state court's sanction of the ex-parte application for an order turning over petitioner's immunized Grand Jury testimony to the Grievance Committee is contrary to this Court's decisions in Bodie v. Connecticut, 91 S.Ct. 780; Mullane v. Central Hanover Bank and Trust Co., 399 U.S. 306, 70 S.Ct. 652; Goldberg v. Kelly, 397 U.S. 254; Snaidach v. Family Finance Corporation, 395 U.S. 337; In re: Winship, 397 U.S. 358; and Armstrong v. Manzo, 380 U.S. 554.

4. The state court's denial of petitioner's claim of extreme prejudice (death of witnesses, etc.) by virtue of the unjustified and unreasonable prosecutorial delay in the prosecution of the state proceeding is contrary to this Court's decisions in Matter of Ruffalo, 20 L.Ed.2d. 1436; Barker v. Wingo, 407 U.S. 514; Klopher v. North Carolina, 386 U.S. 213; and Spevack v. Klein, 385 U.S. 511.

CONCLUSION

Petitioner respectfully prays that the petition for a Writ of Certiorari be granted.

Respectfully submitted,

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New York, New York
August 1st, 1978

APPENDIX A

OPINION OF THE APPELLATE DIVISION

In the Matter of J. JEROME OLITT (Admitted as JEROME OLITT), an Attorney, Respondent. Association of the Bar of the City of New York, Petitioner.

First Department, March 7, 1978.

PER CURIAM:

Respondent was admitted to the Bar in 1954 in the Second Judicial Department. In 1960, he was suspended from the practice of law for two years. (Matter of Silver v. Olitt, 10 AD2d 880, and was readmitted in 1962 Matter of Olitt, 17 AD2d 843.)

Charges of professional misconduct and conduct prejudicial to the administration of justice in that respondent violated Canons of Professional Ethics (15, 16, 29, 32) in the years 1965 and 1966, were brought and were heard in 1976-1977 before a Referee, Honorable Jacob Grumet.

The Referee found that in 1965 the respondent representing a builder, sought to have a zoning change application, submitted on behalf of a rival builder, delayed. The respondent thereafter delivered money in cash to a person who claimed he could effect such delay. Respondent denied that the money passed was to be used to influence the decisions of public officials. The respondent was granted immunity and testified in an ongoing investigation before a New York County Grand Jury as to his actions on behalf of his client, and he cooperated fully with the District Attorney and was granted transactional immunity. He was not

prosecuted.

The petitioner learned of respondent's misconduct in January, 1970 and began proceedings in 1973.

The Referee in his conclusion stated that the underlying reason for respondent's present situation was his overriding desire to please an important client and thereby enhance and improve his professional relationship with the client, and that this so warped his judgment that he failed to see the hazards of his undertaking. Further, that respondent has practically depleted his family resources because of his involvement in this protracted matter. The Assistant District Attorney has confirmed that respondent's meaningful assistance and extensive cooperation resulted in indictments. The Referee recommended that leniency be extended to the respondent.

The motion by petitioner to confirm the report of the Official Referee finding that the charges of professional misconduct have been sustained by the proof, is granted. Were it not for the full cooperation given by the respondent to the law enforcement authorities, we would disbar the respondent. The findings of the Referee are based upon a first-hand opportunity to make his own observations and judgment on the content and character of the testimony before him, and due weight should be given his recommendation. Therefore, we have determined that the respondent be suspended from practice for a period of three years and until further order of this court. (See Matter of Freyberg, 42 AD2d 454, motion for lv to app den 33 NY2d 520, reinstatement 56 AD2d 815.)

KUPFERMAN, J. P., LUPIANO, SILVERMAN, EVANS, and LANE, JJ., concur.

APPENDIX B

ORDER OF THE APPELLATE DIVISION

In the Matter of J. JEROME OLITT (Admitted as JEROME OLITT), an Attorney, Respondent. Association of the Bar of the City of New York, Petitioner.

The Association of the Bar of the City of New York, by John G. Bonomi, Esq., its attorney, having presented to this Court on June 1, 1976, a petition containing charges of professional misconduct against the above-named respondent, J. Jerome Olitt (admitted as Jerome Olitt), who was admitted to practice as an attorney and counselor-at-law in the State of New York, on June 23, 1954, at a term of the Appellate Division of the Supreme Court, Second Judicial Department, and having petitioned the Court to take such action upon such charges as in the judgment of said Court justice may require; and the respondent having appeared herein by his attorneys, Anderson Russell Kill & Olick, P.C., and having interposed an answer to said petition, duly verified May 28, 1976, and petitioner having submitted a reply to said answer, and the Court having duly made and entered an order on June 23, 1976, appointing Daniel Gutman, Esq., as Referee herein to take testimony in regard to said charges and to report to this Court his opinion thereon; and an order of this Court having been made and entered on December 3, 1976 (1) denying respondent's motion to dismiss the petition or, in the alternative, for leave to appeal to the Court of Appeals, (2) vacating the appointment of Daniel Gutman, Esq., as Referee, and (3) appointing Hon. Jacob Grumet as such Referee, and a hearing, pursuant to said order of reference having been duly held

before said Referee and said Referee having duly heard the testimony and proofs tendered by the parties hereto, and having thereafter rendered his report thereon to this Court, which report was dated October 25, 1977, and was filed in the office of the Clerk of this Court on November 10, 1977;

And the petitioner thereafter and on December 29, 1977, having moved for an order confirming the Referee's report and adjudging the respondent guilty of professional misconduct and that the Court take such action herein as it might deem just and proper; and the respondent having cross-moved on December 29, 1977, for an order disaffirming the Referee's report, dismissing the petition and staying that branch of petitioner's motion seeking to impose discipline;

Now, upon reading the petition of The Association of the Bar of the City of New York, verified May 10, 1976, the affidavit of John G. Bonomi, Esq., annexed thereto, sworn to May 10, 1976, the notice of presentation of said petition, dated May 11, 1976, with proof of due service thereof upon the respondent, the answer of the respondent to said petition, verified May 28, 1976, the reply of petitioner to respondent's answer, verified June 10, 1976, the order of this Court, dated June 23, 1976, appointing Daniel Gutman, Esq., as Referee herein, all of which papers were duly filed in the office of the Clerk of this Court on June 23, 1976, and the further order of this Court entered on December 3, 1976 vacating the appointment of Daniel Gutman, Esq. and appointing Hon. Jacob Grument as such Referee, filed in the office of the Clerk of this Court on December 3, 1976, the report of Hon. Jacob Grumet, the Referee herein, dated October 25, 1977, together with the testimony taken by him and the

exhibits ordered in evidence, which were filed in the office of the Clerk of this Court on November 10, 1977; and upon reading and filing the notice of motion for an order confirming the report of the Referee and adjudging the respondent guilty of professional misconduct, dated November 30, 1977, with proof of due service thereof, the notice of cross-motion for an order disaffirming the Referee's report, dismissing the petition and staying that branch of petitioner's motion seeking to impose discipline dated December 22, 1977 with proof of due service thereof, and after hearing Mr. James D. Porter, Jr. for the motion and in opposition to that branch of the cross motion seeking to stay imposition of discipline, and Mr. William L. Darrow in opposition to the motion and in support of the cross-motion and due deliberation having been had thereon and upon the Per Curiam Opinion filed herein; and the Court having unanimously found and decided that the respondent has been guilty of professional misconduct in his office of attorney and counselor-at-law, it is hereby unanimously

Ordered that the report of Hon. Jacob Grumet, the Referee herein, filed in the office of the Clerk of this Court on November 10, 1977, be, and the same hereby is, confirmed, and the cross-motion denied in all respects; and it is further unanimously

Ordered that this J. Jerome Olitt (admitted as Jerome Olitt) be and he hereby is suspended from practice as an attorney and counselor-at-law in the State of New York, for a period of three (3) years effective April 7, 1978 and until the further order of this Court, with leave to apply for reinstatement after the expiration of said period of three (3) years upon furnishing satisfactory proof that during said period he has

actually refrained from attempting to practice as an attorney or counselor-at-law and has otherwise properly conducted himself and has fully complied with Title 22, Section 603.13 of the Rules of the Appellate Division, Supreme Court, First Judicial Department, annexed hereto and made a part hereof; and it is further unanimously

Ordered that said J. Jerome Olitt (admitted as Jerome Olitt) be and he hereby is commanded to desist and refrain from the practice of law in any form, either as principal or agent, clerk or employee of another, for a period of three (3) years effective April 7, 1978 and until the further order of this Court; and it is further unanimously

Ordered that said J. Jerome Olitt (admitted as Jerome Olitt) be and he hereby is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission, or other public authority for a period of three (3) years effective April 7, 1978 and until the further order of this Court; and it is further unanimously

Ordered that said J. Jerome Olitt (admitted as Jerome Olitt) be and he hereby is forbidden to give another an opinion as to the law or its application or any advice in relation thereto, for a period of three (3) years effective April 7, 1978 and until the further order of this court.

ENTER:

ALAN M. BERGER
DEPUTY Clerk.

APPENDIX C

REFEREE'S REPORT

SUPREME COURT
OF THE STATE OF NEW YORK

Appellate Division - First Department

In the Matter

of

J. JEROME OLITT (admitted as

JEROME OLITT),

An Attorney.

I, JACOB GRUMET, the Referee appointed by the order ot this Court made and entered December 3, 1976, to take testimony in regard to the charges of professional misconduct by the above named respondent, as set forth in the petition of the Association of the Bar of the City of New York, verified May 10, 1976, and to report the same with my opinion thereon to this Court, having been duly sworn as Referee herein on the 6th day of December 1976 before Hon. Xavier C. Riccobono, one of the Justices of the Supreme Court of the State of New York, do hereby report as follows:

Petitioner appeared by John G. Bonomi, Esq., and subsequently by James D. Porter, Esq., its

attorney (by Saul Friedberg, Esq., of Counsel). Respondent was represented in these proceedings by his attorneys, first by Phillips Nizer Benjamin Krim & Ballon, Esqs. (by Angelo Cometa, Esq., of Counsel), then by Anderson Russell Kill & Olick, Esqs. (by Authur S. Olick, Esq., of Counsel), and later at the hearings before me by Paul Weiss Rifkind Wharton & Garrison, Esqs. (by Martin London and Richard Mescon, Esqs., of Counsel).

Hearings were held on April 11, 18, 22, May 12, 13, 16, 19, and June 8, 9, 14, 15, 1977.

I. THE PETITION AND THE CHARGE

The petition alleges, in paragraph "IV" thereof, that the respondent has been guilty of professional misconduct and conduct prejudicial to the administration of justice in violation of Section 90 of the Judiciary Law of the State of New York and of Canons 15 (How Far a Lawyer May Go in Supporting a Client's Cause), 16 (Restraining Clients from Improprieties), 29 (Upholding the Honor of the Profession), and 32 (The Lawyer's Duty in Its Last Analysis) of the Canons of Professional Ethics,* which were effective until December 31, 1969.

In substance, the petition alleges that: In or about December 1965, one Melvyn Kaufman, a builder, requested respondent's assistance in

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*The aforementioned Canons, with certain amendments, have been incorporated into the Code of Professional Responsibility, which became effective January 1, 1970. See Appendix to the Judiciary Law, McKinney's Consolidated Laws of New York Annotated.

finding a means to delay approval of, or block entirely, an application for a zoning variance which was sought by one Sigmund Sommer and which was ultimately to be heard before the New York City Planning Commission. Respondent thereafter conferred with another builder, Ralph Elyacher, concerning Kaufman's request and respondent sought Elyacher's assistance in obtaining the desired delay or blockage of Sommer's application.

Elyacher subsequently advised respondent that he, with the aid of other individuals, would undertake to delay or block the Sommer application; he further advised respondent that Kaufman would have to pay a sum of money to be determined by the degree of success attained in either delaying or blocking the application. During this conversation, Elyacher refused to reveal to respondent the identity of the individuals who would be assisting him and he requested that his own identity be concealed from Kaufman. The petition further alleges that, at that time, respondent believed that the means to be employed by Kaufman and Elyacher in delaying or blocking the Sommer application were to be illegal and that the money to be paid did not constitute a legal fee.

Thereafter, Elyacher presented to respondent a written schedule of periodic payments to be made by Kaufman which depended upon the length of time that the application was delayed or blocked. Respondent presented this schedule of payments to Kaufman who made various changes in it and returned it to respondent. Respondent then returned the amended schedule to Elyacher, who subsequently advised respondent that the amendments were acceptable and respondent communicated Elyacher's approval to Kaufman.

Kaufman thereupon advised respondent that he would make the initial payment, which respondent

believed to be the sum of $17,500, by withdrawing cash from his private vault and delivering the money to respondent in a box of wood samples for transmittal to Elyacher. On or about March 12, 1966, the box of wood samples containing cash was delivered to respondent's office and, pursuant to respondent's instructions, it was given to Elyacher. It is alleged that, at that time, respondent believed that the money delivered to Elyacher did not constitute a legal fee, but was to be used to influence the decisions of public officials.

Respondent thereafter continued to act as an intermediary between Kaufman and Elyacher in regard to the aforesaid attempt to block or delay the Sommer application.

THE RESPONDENT'S ANSWER

Apart from denying any knowledge or information with respect to the corporate status and purposes of the petitioner and as to certain actions taken by the petitioner's Committee on Grievances and its Executive Committee, and also denying certain statements made in subparagraphs 1 and 2 of the Charge, as set forth in paragraph "IV" of the petition, the respondent, in effect, admits the allegations contained in the petition and in the Charge, except:

1. Respondent denies that he has been guilty of professional misconduct and conduct prejudicial to the administration of justice as set forth in paragraph "IV" of the petition;

2. Respondent denies the allegation that he believed that the means to be employed by Kaufman and Elyacher in delaying or blocking the Sommer application were to be illegal and that the money to be paid did not constitute a legal fee (paragraph 5 of the Charge);

3. Respondent denies that he believed that the money delivered to Elyacher did not constitute a legal fee but was to be used to influence the decisions of public officials (paragraph 11 of the Charge).

In addition, the respondent asserted eight affirmative defenses in his Answer, which can be summarized as follows:

The First: That at no time did respondent know or believe or have reason to believe that the means to be employed by Kaufman and/or Elyacher in blocking or delaying the Sommer application were to be illegal, immoral or unethical or that the money to be paid was to be used to influence the decisions of public officials and, in fact, such money was not so used.

The Second: That the instant proceedings were instituted by petitioner and are predicated solely and exclusively or in substantial part upon testimony given by respondent before a New York Grand Jury under a grant of transactional immunity. That the Fourth and Fifth Amendments to the United States Constitution, as applied to state action through the Fourteenth Amendment, precluded the imposition upon an attorney of the penalty of suspension from the practice of law on the basis of the attorney's compelled testimony as aforesaid and prohibit the use in disciplinary proceedings of such compelled testimoney. Respondent expressly reserves his right to litigate his Federal constitutional claims in the Federal Court.

The Third: That on account of the delay of almost seven years in the commencement of the instant disciplinary proceedings in January 1973, petitioner is estopped by its own laches from prosecuting the proceeding and from seeking to cause the respondent to be disciplined by reason

of events which occurred in 1965-66.

The Fourth: That on March 9, 1976, respondent requested a copy of the report and recommendation of the petitioner's Committee on Grievances to the petitioner's Executive Committee and an opportunity to be heard by the Executive Committee both orally and in writing, which request was summarily denied. That in denying respondent the opportunity to confront his accusers, to answer the charges against him and to appear through counsel in his own defense, petitioner's Executive Committee has acted without authority, contrary to its own by-laws and in derogation of respondent's rights to a fair hearing and due process.

The Fifth: That the respondent's testimony before the grand jury upon which these proceedings are predicated was obtained on the explicit assurance and affirmative representation of the district attorney that the matter would not be referred to petitioner for disciplinary proceedings and only after respondent was granted transactional immunity. That on or about February 4, 1971, the district attorney, in breach of his aforesaid agreement with respondent, applied to the Supreme Court, New York County, for release of the minutes of respondent's grand jury testimony and obtained an order releasing the same to petitioner. Therefore, the evidence upon which this proceeding is predicated was improperly, unethically and illegally obtained.

The Sixth: That the New York statutory disciplinary procedure denies accused attorneys due process of law and, therefore, the petition fails to state a claim and is null, void and of no force and effect.

The Seventh: That the petition fails to state a claim upon which relief may be granted.

The Eighth: That on or about May 7, 1974, petitioner proceeded to present its case against respondent before the Committee on Grievances pursuant to the charge letter of April 16, 1974. On November 20, 1975, petitioner's Committee on Grievances convened a new hearing panel and initiated proceedings *de novo*. That the said action by petitioner placed respondent in double jeopardy in violation of his rights under the Fifth Amendment of the United States Constitution.

The petitioner served a reply to respondent's answer in which it denied certain allegations contained in the affirmative defense and asserted that the respective affirmative defenses, Second to Eighth inclusive, do not constitute a defense to the petition as a matter of law.

It should be pointed out here that the respondent brought on a motion in this Court, returnable on August 2, 1976, for "an order pursuant to CPLR Sec. 3211(a) and for summary judgment pursuant to CPLR Sec. 3212(b) dismissing the petition herein as a matter of law" on the same grounds as are set forth in the aforesaid affirmative defenses contained in the respondent's answer, except for the grounds alleged in the First Affirmative Defense which, in effect, deny the basic allegations of the petitioner's charge against respondent. By order of this Court, dated December 3, 1976, the respondent's motion was denied. This decision and order, in my opinion, resolved and removed from my consideration all of the same legal issues raised in the affirmative defenses set forth in the respondent's answer, except as otherwise directed by this Court. This seems clear from the following provision in the Court's order:

> "It is further ordered that Hon. Jacob Grumet be and he hereby is appointed Referee in this proceeding to take

> testimony in regard to the charges and report the same with his opinion thereon to the Court, and said Referee in considering the charges set forth in the petition, should consider the effect of the District Attorney's promise, if in fact such promise was made (Palermo et ano. v. Warden, Green Haven State Prison, et al., U.S. Court of Appeals, 2nd Cir., November 1, 1976);"

THE EVIDENCE ON THE CHARGE

As appears from what has been stated above, this proceeding was initiated on the basis of testimony that was presented in the course of a grand jury investigation conducted by the District Attorney of New York County in 1968. The respondent testified before that grand jury under a grant of immunity.

At the hearings before me, the petitioner called as witnesses Melvyn Kaufman, Ralph Elyacher, Michael Freyberg and James Marcus. The respondent, J. Jerome Olitt, testified in his own behalf. He also called several witnesses (mainly related to the question of an alleged promise by the district attorney) and character witnesses.

Despite the reluctance of the petitioner's witnesses to testify and the extensive cross-examination of witnesses, the basic facts in this matter are quite simple, and to a great extent, are admitted by the respondent in his answer and in his testimony. In 1965, the respondent was a tenant in a building owned by Melvyn Kaufman and members of his family (hereinafter referred to as the "Kaufman Organization") at 777 Third Avenue, Manhattan. While a tenant in that building, respondent got to know Melvyn Kaufman socially. Prior to early 1966, respondent had

performed some relatively minor legal services for the Kaufman organization.

One day in December 1965 or January 1966, the respondent, while in the office of Melvyn Kaufman, was informed by Kaufman that he had a problem which he would "like to kick around" with respondent (Respondent, 921-922).* He then proceeded to tell respondent that he was a part owner and builder of a new office building under construction at 437 Madison Avenue, Manhattan; that another builder, Sigmund Sommer, was planning the construction of a new high-rise office building of approximately 40 stories on East 48th Street around the corner of his building, just west of Park Avenue; and that by Sommer securing certain air rights and with an overpass, that building would be connected to the building known as 280 Park Avenue and thereby have the use of that prestigious address for his structure (Respondent, 923); that if the Sommer building "went up," it would affect the tenants that Kaufman would be soliciting for his building because the rental charges per square foot would be about the same for both buildings and since he did not, as yet, have a prime tenant for his building, he would have difficulty in obtaining a construction mortgage (Respondent, 925); that the Madison Avenue building was Kaufman's responsibility in that the Kaufman organization had put this property in his name -- it was "his baby" -- and therefore he was concerned about the possibility of failure in this enterprise; for these reasons, Kaufman "was anxious to delay the completion date of Sommer's building" (Respondent, 925-926).

*All numerical references are to the page numbers in the transcript of the minutes of the hearings held before me, together with the name of the witness.

Kaufman also told respondent that he was mounting a campaign in opposition to Sommer's contemplated construction "and more weight, more opposition would hopefully result in that delay, and he wanted as much opposition as I (respondent) could get." Kaufman asked respondent if he would "ask around and see if a campaign could be mounted"; respondent said that he did not know "anything about that area" but that he "will ask around" (Respondent, 926).

Following this first conversation with Kaufman, respondent did ask around and one of the persons to whom he spoke was Ralph Elyacher, also a builder, client and social acquaintance, of respondent. After explaining the problem to Elyacher and showing him some architectural drawings which he received from Kaufman, Elyacher said he would like to think about it and took from respondent the drawings (Respondent, 928). A few days later, Elyacher telephoned respondent and said that he thought he could help Kaufman. He also told respondent that he didn't want his name used and he didn't want Kaufman to know that he was the one who was helping him (Respondent, 929).

A day or so later, Elyacher came to respondent's office to discuss this matter. Elyacher again stated to respondent that he thought he could help Kaufman, and in that discussion went on to say, "But it's going to cost Mel (Kaufman)." (Respondent, 930-931); he also explained that since he was going to act as a "spoiler," he did not want his name to be used or for Kaufman to know that he was the one who was helping him; besides, he and his family knew the families of both builders that were involved. Respondent testified that when he tried to inquire from Elyacher what he was going to do, respondent was told:

"The Witness (Respondent): Your Honor, all he told me was that he was going to mount a campaign and when I tried to inquire, and I did try to obtain what he was going to do, he would say to me "That's for me to know how I do these things, do not ask me or press me or pressure me, I don't want to discuss it with you, I don't want to tell you how I am going to do it that's up to me how I am going to do it and don't worry, there is nothing wrong and there is nothing improper.'" (Respondent, 930-931)

In the grand jury the respondent related that conversation as follows:

"Don't ask me, don't ask me anything about the matter. You know, Jerry, I love you like a brother; you're a buddy of mine but I don't want you to ask me any questions" he said, "but it's going to cost him if he wants a delay. How much of a delay does he want?" (Grand Jury Trnascript, 472)

When respondent asked Elyacher what would be involved with respect to the cost to Kaufman, Elyacher took out a piece of paper "with a schedule on it that had two columns," one column, on the left side, had months listed, and the other, on the right side, had "some numbers of financial figures" (Respondent, 932). As explained by the witness Elyacher, the contents of the schedule provided for a certain down payment before anything was done for Kaufman; then, certain payments were to be made to Elyacher "every three months or every six months or something like this, as the thing was not approved" (Elyacher, 12, 14, 16, 17). In other words, the payments to be made by Kaufman would depend upon the number of months of ensuing

delay in the processing and disposition of the Sommer application for a zoning variance.

Following this discussion with Elyacher, the respondent brought this schedule of figures to Kaufman and told him that "a personal friend and client" of his thought that he could help, and explained the aforesaid proposition made to him. After Kaufman studied the schedule and made some changes therein and gave his approval, respondent returned the amended schedule to Elyacher, who accepted the changes, and the arrangement was concluded. The amount of the down payment, as agreed, was $10,000* (Elyacher, 14). (This schedule provided for the eventual total payment of approximately $47,000; there was no clear testimony as to the exact amount.)

With regard to the aforesaid meeting with respondent, Kaufman testified:

"The Witness: To the best of my recollection, Mr. Olitt said that -- let me, before I respond, this was at the time that the administration changed in the City of New York and Mr. Lindsay had just come in with a clean-sweep broom. Mr. Olitt suggested to me that he was able to make contact with people in the administration, via others, that he knew of, or knew or something along those lines. Something in that area in the general statement." (Kaufman, 20)

*The testimony regarding the amount of this down payment varied. In the grand jury respondent testified that this down payment was $17,500.

Kaufman further testified that in the course of the aforesaid conversation at his home, the matter of money was mentioned, as follows:

"Q. In the course of the conversation with Mr. Olitt, which you have mentioned, was any mention made of money?
A. Yes, sir.
Q. What was said about money?
A. Mr. Olitt informed me that arrangements could be made for money, whereby aid could be rendered in the direction I was seeking.
Q. Did you agree to give Mr. Olitt money for that purpose?
A. I agreed to give money, not to Olitt, for that purpose.
Q. It was to be delivered to Mr. Olitt for delivery for that purpose by him, is that correct?
A. That's not put properly, but essentially it was delivered to his office, that's correct." (Kaufman, 25)

* * * * * * *

"The Referee: When you said that arrangements could be made for money and not for Mr. Olitt, for whom?
The Witness: I don't know.

Q. Was the money -- how was the money delivered to Mr. Olitt?
A. In a box.
Q. Was it a box of wood samples?
A. That's correct.
Q. And it was cash?
A. Yes.
Q. And the cash was interleaved in the wood samples?

The Referee: What?

Q. (Repeating) The cash was put inside the box of the wood samples?
A. Yes, sir." (Kaufman, 26)

The witness explained that this box was the size of a whiskey bottle box, and contains what are called "flitches" or samples of veneers of wood.

* * * * * * *

"The Referee: Was there any reason that these moneys were handled in cash rather than check?
The Witness: That was the request that was made.

The Referee: By whom?
The Witness: By -- the only one I know of is Mr. Olitt.
The Referee: All right. Did he give you a reason?
The Witness: The people with whom he was dealing wanted cash." (Kaufman, 31)

Although Kaufman testified as above stated, that the respondent told him that the people with whom he was dealing wanted cash, the respondent testified otherwise. He said that it was Kaufman who advised him that he was going to make the payments in cash because "he didn't want his father and brother to know that he was embarking upon any other task" (Respondent, 929, 937, 950).

Upon being asked whether Elyacher ever asked for the money in cash, and whether it would have made a difference if he had asked for it in cash, respondent answered:

"A. Mr. London, if this Elyacher would have asked for it in cash his assurances would have perhaps fallen on deaf ears, and I would not like the tone of it, but when my own client is telling me reasons why they do things that way, and why he prefers it that way, and Elyacher said to me he didn't care, he didn't care either way, so when I --

The Referee: Elyacher wouldn't have accepted a check made to his order from the Kaufman organization?

The Witness: Absolutely not. It could have been worse. He could have made the check out to me." (Respondent, 33-34)

Elyacher testified that respondent told him that the money was to be paid in cash because Kaufman wanted it that way (Elyacher, 732).

In any event, Kaufman made the initial down payment of $10,000 during March 1966 (Respondent, 955; Elyacher, 24). Kaufman testified that he put the cash in a box of wood samples and that someone from his office deliver it to the respondent's office. Respondent, at that time, was on vacation with his wife in Puerto Rico. However, prior to leaving, respondent notified Elyacher that Kaufman would be delivering the cash to his office in a box of wood samples and that Elyacher would be informed when it arrived so that he could come over to pick it up; respondent also left instructions with his office associate that if such box was delivered by Kaufman's office, he should call Elyacher and ask him to come over to take the package or box. The box was delivered to respondent's office and Elyacher came and fetched it. The box was not opened while it was in respondent's office and there is no claim by anyone that res-

pondent or anyone on his behalf received any part of the cash enclosed therein (Respondent, 954-955; Elyacher -- cross, 732, 742).

As to what happened to this $10,000, the testimony of Elyacher is that he took the box which was delivered to respondent's office to his own office; there he took the cash from the box and put the money in a filing cabinet where it remained for about a week; then, allegedly he put part of the money in his bank and kept part in his office (Elyacher, 726). What, if anything, Elyacher did between March when he received the money and June is not clear. But as will appear later, something occurred in June which stirred Elyacher into action. He allegedly retained an attorney, Murray Boxer,* who had represented him previously in real estate matters, to assist him in opposing the Sommer application. For this work, Elyacher said he paid Boxer some of the money he received from Kaufman, without specifying the amount (Elyacher, 726, 745, 749).

Elyacher further testified that he also discussed the situation with Michael Freyberg, a personal friend whom he had known since the late 50's and who at the time here involved was a member of the New York City Tax Commission. He was appointed a member of that Commission in January 1966, and in about July of that year was appointed President of the Commission. His position was part time and he also practiced law (Elyacher, 17-18; Freyberg, 577, 578). It appears that after Elyacher learned that the Sommer application was transferred from the New York City Building Department to the New York City Planning Commission that he decided "to give money to Freyberg." Elyacher testified that he gave $5,000, in cash, to

*Murray Boxer died in 1971.

Michael Freyberg some time in 1966; he was not sure of the date but he thought it was during the summer of 1966, as he testified before the Grievance Committee in 1975 and because of the aforementioned reason which helped him fix that date (Elyacher -- cross, 729, 752-756). The money was placed in a white envelope by Elyacher and during a luncheon meeting he had with Freyberg, he handed the envelope to Freyberg who was told that money was in the envelope.

There is some conflict in the testimony about the conversation at this luncheon meeting between Elyacher and Freyberg. After having his recollection refreshed, Elyacher admitted that he specifically discussed with Freyberg the matter of the Sommer application.

Freyberg, in his testimony, stated that in his initial conversation with Elyacher, he was asked whether he would represent Elyacher and other people associated with him in connection with a matter that was before the City Planning Commission; that no names of anv of the persons involved and no addresses of any buildings were mentioned; in fact, he did not believe that the word "variance" came up in that conversation (Freyberg, 578-580); subsequently, he had a discussion about this matter with James Marcus (who had been an assistant campaign manager in the Lindsay mayoralty campaign and who about this time was Special Assistant to Mayor John V. Lindsay), a close friend of his. Marcus told him that the law firm with whom he was associated handled matters of that nature, administrative proceedings; although Marcus was not an attorney Freyberg said he did not know this at that time. Subsequently, Freyberg informed Elyacher of what Marcus had told him and he gave Elyacher the names of Marcus and Herbert Itkin (whom he believed to be either a partner or in some way connected with Marcus in a

law firm) and suggested that he speak to them about this matter (Freyberg, 589). Elyacher advised him that he had already spoken to Itkin; and later Elyacher told him that he had called and spoken to Itkin and had asked the aforesaid firm to represent him in the instant matter and that they agreed to do so; and they determined that the retainer fee was to be $5,000, subject to being enlarged if the matter required a greater fee (Freyberg, 589); at no time in his conversations with Elyacher did Elyacher mention the name of the respondent, nor did he at that time know the respondent (Freyberg, 585). Freyberg further testified that thereafter Elyacher asked him to give the fee ($5,000) to Marcus and/or Itkin, together with some documents or papers that were relevant to the matter pending before the New York City Planning Commission. The reason given him by Elyacher for asking him to get involved "as more or less a messenger boy" was because Elyacher felt that since he was coming to the firm as a new client, he would get better treatment as a friend of Freyberg; he delivered the money and papers to Marcus and Itkin at their office on Madison Avenue; he did not get any part of the money (Freyberg, 590-592); nor did he see them divide the money (Freyberg, 591).

Petitioner also called Marcus as a witness, whose testimony contradicted Freyberg's in the following respects: Marcus testified that he knew Michael Freyberg, having met him during the Lindsay campaign in 1965; early in 1966, Freyberg asked him to set up a meeting for him with Herbert Itkin; he said that there was a matter about which he wanted to talk to Itkin that involved a variance and that there was a fee. Approximately some days later, he set up a meeting which took place at 300 Madison Avenue and at which Itkin, Freyberg and he were present. He stated that Freyberg talked about a variance that "had something to do

with Park Avenue, I believe"; that he said "somebody had come to him to block a variance and he wondered if Itkin could get Oscar Bloustein to intervene with his brother." Freyberg further stated that "there was $5,000 initially and I believe the figure was $20,000 total if it was successful. So Freyberg split $5,000 three ways among Itkin, Freyberg and myself" (Marcus, 77-79). Marcus further testified that as he left the library where the meeting took place, Oscar Bloustein was right outside the door and Itkin handed him about $400, "At least, that's what he said. That's what Itkin said he handed him. He said, 'Here, Ozzie, here's some money to start.' And he said, 'I'll tell you the facts later.' And he walked with Freyberg and me to the elevator." Itkin and Bloustein occupied neighboring offices in the aforesaid suite of offices (Marcus, 79-80). Marcus testified that he did not know the respondent and never heard his name mentioned outside of these proceedings (Marcus, 81).

The testimony of Freyberg and Marcus with respect to the receipt and the distribution of the money which they obtained from Elyacher is, of itself, not controlling in the disposition of this matter. But this testimony is significant on the question as to whether it was within the contemplation and belief of the parties making the arrangement whereunder Kaufman turned over a substantial sum of cash to respondent in a wooden box which was given to Elyacher, that the said moneys would or might be used improperly or illegally to obtain Kaufman's objective of delaying or blocking the Sommer application.

Furthermore, while no evidence has been presented to show that the respondent received any part of the moneys which passed from Kaufman through respondent to Elyacher, the petitioner did submit evidence which it is urged demonstrates

that respondent did benefit financially from his participation in this Kaufman-Sommer affair. Petitioner's witness, Kaufman, testified that the respondent, as his "end" in the transaction, was put on a legal retainer of $100 a week by the Kaufman organization, which retainer was to last "as long as this thing hung fire." The retainer started in March 1966 and terminated in August 1966, for a total of about 21 weeks (Kaufman -- direct, 32-33). The respondent admits that he was on retainer by the Kaufman organization of $100 per week during this period for which he claimed he rendered various services, but insists that the said retainer and the period of its duration were merely coincidental with the then pending efforts by Elyacher and others to delay the approval of the Sommer application, and had no relationship thereto (Respondent, 902-904; 917). In addition to the retainer of $100 a week, totalling $2,100, received by the respondent during this period, he also received two additional fees of $100 and $750, respectively for services rendered to members of the Kaufman family. The respondent felt that although these fees were inadequate he accepted them because he was on a weekly retainer of $100 a week and had already received about $2,000 (Respondent, 920-921). He was also hoping that he would make a more permanent connection with the Kaufman organization.

To conclude the events of this entire situation, the testimony regarding one further intervening episode should be mentioned. Respondent testified that in June 1966, he received a telephone call from Kaufman, who was "livid." He told respondent that he had just received a letter from Sommer's attorney notifying him, as one of the owners of property within a certain radius of the Sommer property, that his client's application for a zoning variance will appear on the calendar of the calendar of the New York City Planning Com-

mission on July 20, 1966. That evening, respondent went to Kaufman's home where he found him to be very upset about this letter. He told respondent, among other things, that he didn't believe that anything was being done about the Sommer application and that he wants "to see a show of strength," by which he meant that he wanted to meet somebody and find out what was going on (Respondent, 43). Respondent told Kaufman that he could not provide answers to his questions and he therefore picked up the telephone and called Elyacher, without mentioning his name in Kaufman's presence, and arranged to see him at respondent's office the next day.

When respondent met Elyacher, he told him about the letter which Kaufman had received and how upset he and Kaufman were because of this development; he also told Elyacher that he would like to have someone meet Kaufman and tell him what was being done for him. Elyacher promised to "get back" to respondent. Within a day or two, Elyacher contacted respondent and informed him that an attorney, Murray Boxer, who was also a Justice of the Peace in a small town in Rockland County, but maintains his law practice in Manhattan, and who was a specialist in real estate matters, knew everything that was being done for Kaufman; he suggested that respondent arrange a meeting at which Judge Boxer would explain everything to Kaufman. Respondent telephoned Kaufman and told him of the proposed meeting; later at Kaufman's office, respondent, in discussing the forthcoming meeting, for the first time, disclosed to Kaufman the fact that Elyacher was involved in the matter. Kaufman did not want to meet Boxer at his office or in respondent's office, but rather in a hotel room; accordingly, respondent engaged a room at the Waldorf Astoria Hotel where the meet- was held on June 22, 1966 at 2:00 P.M. (Respondent, 964-967); present were Kaufman, Boxer, and

respondent; Elyacher chose not to attend. Prior to this meeting, respondent met with Elyacher for lunch at noontime and there, for the first time, met Boxer. At lunch, Elyacher tried to impress respondent with Boxer's credentials as a specialist in these matters and also that he might be a candidate for Lieutenant Governor in the upcoming political primaries that fall (Respondent, 967-970).

At the meeting, respondent introduced Boxer to Kaufman. Thereupon, Boxer explained to Kaufman what he planned to do for Kaufman, to wit, to appear in person at the July 20th hearing of the New York City Planning Commission and, in the capacity of a private citizen, or representing an owner of record, to submit papers which he prepared and argue in opposition to the Sommer application. Kaufman informed Boxer that he had retained the law firm of Lindenbaum & Young to oppose the application. Arrangements were made by Kaufman to have a copy of that law firm's memorandum in opposition transmitted, through respondent, to Elyacher so that their efforts could be coordinated (Respondent, 976-978).

According to respondent, Kaufman was not at all impressed with Boxer or what he could do. He told the respondent as they left the meeting, "Who's that farmer? And are they kidding? -- The guy is nuts." Subsequently, when respondent met with Elyacher and reported on the meeting, he admitted that Boxer "sounded idiotic" and that "the man was really erratic" (Grand Jury Transcript, 578-579). In that connection, it appears that when respondent testified before the grand jury, he admitted that as a result of meeting Boxer, he felt that Boxer was not the main person that Elyacher was dealing with. At the hearings, when respondent was confronted with his aforesaid admission, he insisted that his answer before the

grand jury was incomplete and did not reflect his view (Respondent -- cross, 1158-1159, 1162; Grand Jury Transcript, 519-520).

It was also probably at about this time that Elyacher, according to his testimony, decided to give $5,000 to Freyberg, although he had spoken to Freyberg about this matter earlier in 1966 (Elyacher -- cross, 752-756). In August 1966, Kaufman was advised that the Sommer application was approved by the New York City Planning Commission.

THE RESPONDENT (BIOGRAPHICAL SKETCH)

The respondent was born on August 22, 1928 in Manhattan, married in 1955, and has four children. He attended the College of the City of New York and graduated cum laude in 1949; he graduated from the New York University Law School in 1952. Thereafter, he served for two years in the Korean War and was discharged in 1954. In June 1954, he was admitted to the Bar. During that year he was employed as a law clerk by the law firm of Demov & Morris; then in 1955 he worked one year for Harry Lipsig, Esq., following which he was employed by the law firm of Fallek & Connolly in Brooklyn, N.Y., which was engaged in the practice of "negligence" cases. Between 1952 and 1956, he attended Brooklyn Law School, at night, and received a Master's of Law Degree (Respondent, 863-869).

In May of 1956, the law firm of Fallek & Connolly ceased to operate. This was the result of an investigation and prosecution that was conducted by the District Attorney of Kings County arising out of, or in connection with, an investigation by a committee, known as the Arkwright Committee, into the solicitation of negligence cases by lawyers in Kings County. Respondent also became involved in that investigation which led to the

institution of disciplinary proceedings against him. In consequence of those proceedings, respondent was suspended in May 1960 for a period of two years by the Appellate Division, Second Department (Respondent, 871-874). In September 1962, he was readmitted to the practice of law and he then became a member of the law firm of Wagner & Olitt at 32 Broadway, Manhattan. This firm had a general practice but handled mostly commercial matters. Respondent remained with that firm and an additional partner, Thomas De Maio, until September 1965. Through other personnel changes made, the law firm is presently known as Olitt & Klein, which handles mainly corporate and commercial matters and is located in the Pan-American Building at 200 Park Avenue, in Manhattan.

CHARACTER WITNESSES

Supreme Court Justices Bentley Kassal and Fritz Alexander testified as character witnesses for the respondent. Judge Kassal testified that he considered the respondent's reputation as excellent and being "a very hard working, persevering, sincere adversary who is honorable." Judge Alexander, who was a classmate of the respondent in law school and later worked with him in the same office, stated that "he enjoys an excellent reputation for legal scholarship, diligence and dedication to his undertakings and tasks."

Several other witnesses likewise testified that his reputation for truthfulness and veracity and professional competence was of the highest. One of his clients put it this way. "His integrity is absolutely beyond reproach."

THE FINDINGS OF THE PETITIONER'S CHARGE

Whatever contradictions may appear in the testimony given at the hearings before me, the

evidence is quite clear that the respondent lent himself to a project on behalf of his client, which his mature judgment should have at least forewarned him was fraught with potentially improper if not illegal conduct for an attorney.

What Kaufman initially asked respondent to do for him was, using respondent's words, "ask around and see if a campaign could be mounted," and also "to ask around and see if there is something that can be done to block or delay the Sommer application for a zoning variance" (Respondent, 926; Respondent -- cross, 1110). At that time, respondent was told by Kaufman that he had his "own people who can try to block it and delay it," and that he was taking his "own procedures" to attempt to fight and block this (Respondent -- cross, 1111). What Kaufman was asking respondent to do was no small request. The testimony does not show that respondent tried to have Kaufman define clearly or limit precisely what he had in mind for the respondent to do.

Respondent undertook this open-end type of assignment and contacted, among others, Ralph Elyacher, who he knew was not a lawyer, and discussed Kaufman's request with him. He did not ask Elyacher to recommend a lawyer who had expert knowledge in the field of zoning variances. Elyacher, after considering the problem, told respondent he could help Kaufman but it would cost money and he didn't want Kaufman to know that he was involved. When respondent wanted to know what it would cost, Elyacher handed respondent a schedule of proposed payments to be made by Kaufman which required a down payment and then periodic payments depending on the number of months that action would be delayed in the processing of the Sommer application. Furthermore, when respondent inquired as to what would be done and how the delaying action would be accomplished, he was told not to ask questions

and "That's for me (Elyacher) to know how I do these things. . ." (Respondent, 930-931).

When respondent testified before the grand jury in 1968 in connection with an investigation conducted by the District Attorney of New York County, relating to this matter, he testified as follows:

> "Q. Let us clear up one point, and please answer this with a yes or no. There is no question, is there -- withdrawn. You knew at the time what you were doing for and on behalf of Melvyn Kaufman was wrong, did you not? Yes or no.
>
> A. If you are asking that in the point of time from the moment he first spoke to me, my answer to you would be no, I didn't recognize that there was anything wrong at the moment he started.
>
> Q. When did you recognize that there was something wrong?
>
> A. When I carried the message about the money.
>
> Q. About money?
>
> A. Yes.
>
> Q. So that would be at the beginning. He said 'Can this application be delayed,' and so on and so on?
>
> A. No, please permit me to do it my way. I felt it was wrong when Ralph said there was money involved.
>
> Q. And that would be in the beginning of 1966?
>
> A. Right, but I didn't encourage Mr. Kaufman to say yes.
>
> Q. Mr. Olitt, we will never get through --
>
> A. That is very important to me. I never said 'Melvin Kaufman, you better do this.'

Q. Did anyone suggest that you did?
A. Well, he makes it sound like that.
Q. I am merely asking you a question, and you have got to answer these questions or we will never get out today. It was the beginning of January, 1966 that this conversation that you had with Elyacher asking about money took place?
A. Yes, sir.
Q. And you knew from that point on what you were involved in was wrong; is that right?
A. Yes, sir." (Respondent, 947-949).

The above testimony was read to respondent by his attorney when he testified at the hearings, and he was asked to explain "what was incorrect about those answers." Respondent then attempted to explain that when he gave that testimony in 1968, it was at a time when he had already been informed by the district attorney as to what Elyacher did with some of the money he received from Kaufman and how that money was passed on to others, and the intended purpose thereof, and it was in that "frame of reference" of what he knew in 1968, that he spoke of the events that occurred in 1966 (Respondent, 949). I am not persuaded by that explanation.

Be that as it may, it seems clear to me, aside from the respondent's aforementioned testimony, that when Elyacher requested the payment of certain substantial amounts of money and he would not explain what action he planned to take or what he was going to do with the money, respondent, as an attorney with ten years of active experience in 1966, and whom I did not find to be a naive person, should reasonably have been put on notice and at least should have suspected and have reason to believe that some irregular, improper or illegal conduct might be involved. Instead of insisting

upon receiving a straightforward explanation from Elyacher of just what action he contemplated taking, respondent was content to accept Elyacher's refusal to divulge the course of his conduct or the means he intended to employ in the situation. It would appear that respondent felt it was sufficient for him to turn his back and adopt a know-nothing posture which he thought would insulate and protect him from any reverberations of possible acts of illegality or impropriety. The fact remains that respondent did not withdraw or attempt to withdraw from this questionable transaction, but proceeded therewith and delivered the schedule of payments to Kaufman, for his consideration.

When respondent met with Kaufman, following his meeting with Elyacher, there were three significant phases in their discussion: the first dealt with the report by respondent of the inquiries he had made and the fact that he learned that something could be done; according to Kaufman's testimony, respondent said that "he was able to make contact with people in the administration, via others, that he knew of, or knew or something along those lines . . ." (Kaufman, 20); second, respondent delivered and explained to Kaufman the schedule of payments which he received from Elyacher; and third, there was some discussion as to the amount requested and how the payments were to be made. Here, again, according to Kaufman's testimony, it was respondent who told him that the people with whom he was dealing wanted cash (Kaufman, 31). On the other hand, respondent testified that it was Kaufman who, for reasons which he explained, advised respondent that he would make the payments in cash (Respondent, 936). It is my opinion that it was understood by all that the payments would be made in cash.

Even if respondent's suspicions and professional concerns were not sufficiently aroused when

he previously received Elyacher's request for money, it is difficult to accept respondent's assertion that he had no reason to assume, believe or expect that anything improper might be done in achieving Kaufman's objective after his discussion with Kaufman, when he knew that the money would be paid in cash and also the secretive manner in which the down payment of $10,000 (at some other point stated to be $17,500) was going to be delivered (Respondent -- cross, 1054).

Even at this state of the arrangements, according to the evidence, respondent did not obtain further information from Elyacher as to how the money was to be used, nor did he offer any protest or indications of an intention to withdraw from the project. To the contrary, he continued willingly to act as Kaufman's intermediary throughout the entire transaction.

Interestingly, when respondent was cross-examined before me regarding this aspect of his conduct in this matter, his attention was directed to the following testimony which he previously had given before the petitioner's Grievance Committee in 1973:

> "'Q. You also used the phrase "involved in an impropriety."
> 'Now, are you suggesting that the impropriety was Elyachers and not yours because you did not know precisely what he was going to do with $17,500 in cash?
>
> Witness: 'No, its my impropriety, my impropriety.
> 'But the same way I answered Miss McDonald's question by saying, please don't push me to have to say the extra part of it. You know the knowledge, the participation, my impropriety, my

> conduct, wrongful and questionable, not skirting it.
> 'But only asking -- view the whole scene, the whole scene, sit there with me and then figure, well, I'm supposed to turn, according to the Canons, and tell Mel Kaufman in his den, when other incidents occur I'm supposed to say to him . . . I'm supposed to deter him.
> 'I read them carefully. I'm supposed to discourage him, I'm supposed to tell him "you should not get involved." It sounds bad, and I suppose if the Canon says -- he continues and wants to go along with it, no matter what I have just said to deter him, I'm supposed to terminate the relationship.
> 'I didn't do that, if the Canon says it, and that's what I was supposed to do, sir, but I didn't do that.'"
>
> "Q. Now, having heard those questions and answers, were you asked those questions and did you give those answers?
> A. Yes, sir." (Respondent -- cross, 1054-1055)

There is no evidence that any of the money which Kaufman gave Elyacher through respondent eventually reached any public official in the New York City Planning Commission. There is evidence, however, that the sum of $5,000 in cash was divided among Freyberg, Marcus, Itkin and Oscar Bloustein. The respondent did not know any of these individuals. But that is not important here. What is important and determinative is the fact that respondent, under the aforementioned circumstances believed, or reasonably should have believed and expected that the arrangements which respondent made on behalf of Kaufman with Elyacher, might well include the use of Kaufman's money in

an attempt to influence the decisions of a public official or public officials in delaying or blocking the Sommer application. A substantial amount of cash was being turned over by respondent to Elyacher and more was to come. It was not sufficient for respondent to have accepted and have been put off by Elyacher's reply, "--do not ask me or press me or pressure me, I don't want to discuss it with you, I don't want to tell you how I'm going to do it, --" (Respondent, 930-931); "Don't ask me who, don't ask me anything about the matter. You know, Jerry, I love you like a brother; you're a buddy of mine but I don't want you to ask me any questions" (Grand Jury Transcript, 472). As an attorney, he was under a duty to pursue it, and insist that he be informed how Elyacher, who was not a lawyer, was going to use the money, what he was going to do for Kaufman and how he was going to accomplish it. Absent such information, he was under a duty to terminate the relationship.

The respondent himself acknowledged and expressed this same view when, in a letter of April 26, 1973, which he wrote to the Grievance Comcomittee, he said, in part:

> "Sincerely and admittedly my instinct and experience suggested that Elyacher might be involved in some kind of impropriety to accomplish a delay." (Respondent -- corss, 1058-1061)

CONCLUSION

The petition herein alleges that the respondent violated Canons of the Canons of Professioal Ethics (15, 16, 29 and 32). Pursuant to the applicable provisions of those Canons, and on the evidence before me, I find that the petitioner's charge has been sustained.

II. THE RESPONDENT'S DEFENSE OF LACHES

At the hearings, respondent urged that his defense of laches (Third Affirmative Defense) was an issue that I should consider and resolve. The petitioner argued that this issue was disposed of by the decision and order of this Court, of December 3, 1976. I, too, am of the view that this Court considered and resolved this question in connection with the respondent's motion to dismiss the petition and for summary judgment, particularly because the Court's order did not direct me to look into this matter as it did with respect to another of respondent's defenses.

However, at the hearings, petitioner's attorney moved to strike from the record all of the testimony presented by respondent relating to laches. I stated that I would take that motion under advisement and that I would deal with it in my report (Respondent, 986). Thereafter, as that evidence continued to be put in the record, petitioner's attorney did not press his motion but, in fact, consented to the admission of certain evidence on laches offered by respondent, I shall permit the said evidence to remain in the record for what it's worth and I shall briefly comment thereon.

Although there is no statute of limitations applicable to disciplinary proceedings, it is true that considerable time has elapsed since January 30, 1970 when petitioner claims it first learned of respondent's alleged improper conduct. It was not until January 11, 1973 that petitioner notified respondent that it was investigating him and charges of his alleged professional misconduct were served on him on May 11, 1973. The petitioner has attributed this delay of three years to its desire to await the outcome of the Freyberg pros-

ecution and to internal reasons. The record shows that one of the respondent's previous attorneys stipulated that the delay since May 11, 1973 is not attributable to petitioner (Respondent, 1002). From May 11, 1973 to the present, the time has been taken up with a number of legal moves by respondent directed against the petitioner's continuance of the instant proceedings and the hearings before the Grievance Committee.

With respect to the charge against respondent, as contained in the petition, both sides have had full access to all witnesses who had any material evidence to offer, except certain persons who have died in the interim and, therefore, were not available. According to respondent's post-hearing brief, one possible witness, William Kaufman, father of Melvyn Kaufman, who might have been called by him, died on October 26, 1976. I do not believe that his testimony, as indicated by respondent, would have had any effect on my findings herein. Petitioner has pointed out in its post-hearing brief that William Kaufman was not called as a witness by respondent during the Grievance Committee hearings. Another possible witness, Murray Boxer, died in 1971, which was at a time when the Grievance Committee was still pursuing its investigation of respondent.

As to the claim by respondent that assistant district attorney Rogers allegedly promised that he would not initiate disciplinary proceedings against respondent or refer same to petitioner, one witness, William Kleinman, who would have been called by respondent, died in April 1969. This was not long after respondent testified before the grand jury and before petitioner learned of respondent's alleged misconduct. Nevertheless, Kleinman's law partner, Mark Landsman, who was fully familiar with all the facts and who had been present at all pertinent meetings with assistant dis-

trict attorney Rogers, was available and testified. Another possible witness, Morris Marks, who was employed as an accountant in the district attorney's office in New York County, died on January 6, 1973, which appears to be four days before the petitioner notified respondent of the proceedings against him. At the hearings the respondent attempted to testify regarding an alleged conversation he had with Marks at the district attorney's office subsequent to the time that the aforesaid alleged promise was made. The petitioner moved to strike this testimony on the ground that it was hearsay. I reserved decision at that time. Upon reviewing the aforesaid testimony regarding respondent's alleged conversation with Marks, I am not satisfied that the said conversation, if had, was within the actual presence of Rogers, or that he heard it, and therefore I find that this testimony was hearsay and should be excluded (Respondent, 136-139).

While obviously the proceedings in this matter have been for various reasons protracted for an unduly long period of time, I do not believe that the respondent has been prejudiced to the extent that these proceedings should be barred. Accordingly, in consideration of all the circumstances, it would seem to me that the petitioner should not be estopped from prosecuting this matter.

III. THE ALLEGED PROMISE MADE TO RESPONDENT BY THE DISTRICT ATTORNEY OF NEW YORK COUNTY

As was previously mentioned, the respondent has urged in the Fifth Affirmative Defense in his answer that the instant proceedings should be discontinued on the ground that:

"Respondent's testimony before the Grand Jury upon which these proceedings are predicated was obtained on the explicit assurance and affirmative representation of the District Attorney that the matter would not be referred to petitioner for disciplinary proceedings and only after the respondent was granted transactional immunity.

"That on or about February 4, 1971, the District Attorney, in breach of his agreement with respondent applied to the Supreme Court, New York County, for release of the minutes of respondent's Grand Jury testimony and obtained an order releasing the same to petitioner."

The Court has directed that I shall consider the effect of this promise, if in fact such promise was made (Palermo, et ano, v. Warden, Green Haven State Prison, et al., U.S. Court of Appeals, 2nd Cir., November 1, 1976).

THE EVIDENCE

The respondent testified as follows: that during the summer or fall of 1968, he received a telephone call from assistant district attorney Frank J. Rogers of New York County, and was advised that Mr. Rogers wanted to speak to him in connection with a pending investigation (Respondent, 117-118).* Respondent was also served with a subpoena. Shortly thereafter, respondent, being upset about this development, and knowing that Kaufman and Elyacher had been called down to the district attor-

*The numeral references here are to the page numbers of the transcript of the minutes of the first part of these hearings which pertained only to the question of the alleged promise.

ney's office, attempted to reach "Col." William Kleinman, an attorney of the law firm of Kleinman and Landsman, who had assisted respondent in 1956 in his prior disciplinary problem. Although Kleinman was at that time attending a party at the home of his son-in-law and partner, Mark Landsman, in Atlantic Beach, Long Island, respondent and his wife felt that the situation was important enough to go out there to see Kleinman. When he met Kleinman, respondent told him about the subpoena he had received from the district attorney and what the matter involved; after he finished describing the matter to Kleinman, he then asked him "to please help me (respondent) protect my license to practice, that I felt it was going to be threatened . . ."; respondent also tried to explain that he didn't believe he committed any kind of wrongful or unlawful act (Respondent, 119-121).

Respondent further testified that subsequently he, together with his attorneys, Kleinman & Landsman, went to assistant district attorney Rogers' office on several occasions. On or about September 18, 1968, respondent's attorneys met with Rogers and a detective in his office; the respondent was not present during that conference but sat outside the office on a bench in an anteroom; respondent had no conversation with Rogers on that day (Respondent, 124-125). On the following day, respondent again, together with his attorneys, went to Rogers' office. Once again, respondent did not go into Rogers' office to attend the meeting, but remained outside on the bench. According to respondent, after that meeting was concluded, his attorneys came out of the room with Rogers behind them and his attorney, Landsman, explained to him that he (respondent) "had been granted immunity" with regard to his testimony and that "he (Landsman) had received (a) promise from Mr. Rogers that I (respondent) would

have no bar problems." Kleinman, at that point, said to respondent, "You understand, Jerry, that you must testify truthfully and that's the only way there will be any problem, and you will not have any bar involvement." Then Kleinman turned to Rogers and he said, "Is that right, Frank?" -- And Frank said, 'Yes, Colonel'" (Respondent, 127, 140).

Landsman testified on this point, as well as about his and Kleinman's conversation with Rogers on that day, as follows: that the conversation with Rogers about the immunity "was substantially longer" than with regard to the disciplinary problem; that he had indicated to Rogers that he was not concerned that respondent had committed any crime but that his primary concern was that respondent had a prior disciplinary problem and he wanted to make sure that respondent did not have any additional disciplinary problem; that Rogers gave him "the assurance that he would not initiate or refer this matter over"; that he then went outside and brought the respondent in; and in the presence of Kleinman, Rogers and a detective, he repeated what Rogers had agreed with him; that Rogers was standing there nodding his head but "He did not say -- he didn't repeat it. I was talking to Olitt"; also, Landsman did not "recall whether he (Rogers) confirmed it by nodding his head or by saying anything --," and he did not recall "him (respondent) saying anything at that time" (Landsman, 67-70).

When Landsman returned to his office that day, following the aforesaid meeting with Rogers and the others, he prepared a memorandum for his file. That memorandum was introduced into evidence by petitioner (Exhibit 3) and read as follows:

"9/19/68

At. A.D.A. Frank Rogers office

ABT. 11:30 A.M. —

Rogers interviewed Olitt in Presence of MAL, WWK, and Det. Trefcer

Olitt Promised Immunity if He Testified Before GD Jury --"

Rogers was called as a witness by the petitioner. He admitted that he had several meetings with Landsman, Kleinman and respondent; at the first meeting with Landsman (he could not recall whether Kleinman was present but he knew that respondent remained outside), Landsman wanted to know if he would be willing to ask the grand jury whether they would grant immunity to respondent, and he said "yes"; at the second meeting when Kleinman came in with Landsman, they again discussed this matter and they then brought respondent into the office and Rogers told respondent that he would ask the grand jury to grant him immunity (Rogers, 192); Rogers spoke to Landsman and respondent on a number of occasions, both before and after respondent testified before the grand jury, but at no time did he promise respondent or his attorneys that respondent "would not be subjected to professional discipline by reason of matters that he might have disclosed in his testimony"; neither did he promise not to initiate any professional disciplinary proceedings nor that he would not refer the matter to the Grievance Committee (Rogers, 194-195, 222-223).

During cross-examination, Rogers admitted that respondent's attorneys, in their conferences in September 1968, may have brought up the matter of respondent's possible disciplinary problem, but

that he "absolutely" made no commitment because he "couldn't" (Rogers, 207-208); that a standard answer is usually given in such situations, to wit, that the Bar Association would be advised of the cooperation given by the attorney involved; Rogers testified that in his entire career as an assistant district attorney covering the period of 14 years, he had no recollection of ever having made such a promise as is claimed here by respondent (Rogers, 225-226).

THE FINDINGS

An oral promise, allegedly made by a district attorney, that is beyond his power and authority, and is in contravention of his official duties, and affects the administration of justice and the public interest, requires most careful scrutiny. What then is the nature and probity of the evidence submitted to support the respondent's claim?

In the first place, this alleged promise, although claimed to have been made to respondent's attorneys on September 19, 1968, in their private conferences with Rogers, was never expressed or repeated by Rogers directly to respondent, or in his presence, either during the aforesaid conferences or at any of the several times during which respondent saw Rogers thereafter while testifying before the grand jury. At most, Rogers was said to have nodded his head, or respondent heard him say "yes" when Kleinman, after the second conference, told respondent in somewhat general and indefinite terms that he would have no Bar involvement (Respondent, 127-132).

Furthermore, what is especially noteworthy is the fact that although Landsman testified that during the aforementioned conferences in speaking to Rogers, his primary concern was "to make sure that (respondent) did not have any additional

disciplinary problem" and he thereupon allegedly obtained such an assurance from Rogers, yet when Landsman returned to his office that same day and make a memorandum of his discussion with Rogers, all that was mentioned was that respondent was "promised immunity" if he testifies before the grand jury. Nothing at all was noted about Rogers' alleged promise not to refer the matter to petitioner.

In addition, in January 1973, Landsman received a letter from respondent, advising him that disciplinary proceedings were contemplated against respondent as a result of the 1968 testimony before the grand jury. Landsman had occasion to see and did see Rogers after that date, and certainly Landsman knew where he could reach Rogers, but at no time did Landsman mention or discuss with Rogers the subject of Rogers' alleged promise (Landsman, 72-79). There is no testimony that respondent requested Landsman to speak to Rogers about this alleged promise after he received the aforesaid letter.

The respondent's answer to the petition asserts in his Fifth Affirmative Defense that Rogers breached his agreement in that on or about February 4, 1971, the district attorney applied to the Supreme Court, New York County, for an order releasing the respondent's grand jury testimony to petitioner. According to Landsman's testimony, this action, in itself, by the district attorney would not appear to constitute a breach of this agreement.

On this point, Landsman testified as follows:

"Q. You aren't saying, are you, that Mr. Rogers told you that he would refuse to comply with a request to turn the Grand Jury minutes over to the Grievance

Committee if he was requested to do so by the Grievance Committee?

A. No.
Q. You aren't saying, are you, that Mr. Rogers told you if the Grievance Committee asked him for information he would refuse to give that information?
A. Assuming that the original basis for it didn't come from him.
Q. Yes, assuming that.
A. Then he would be honoring his commitment." (Landsman -- cross, 81)

Just to round out this aspect and for background, brief reference will be made to the testimony which shows how these disciplinary proceedings commenced.

In November 1969, an article in The New York Times, which reported that an unnamed commissioner in New York City was implicated in an investigation by the District Attorney of New York County, was brought to the attention of John G. Bonomi, chief counsel to the petitioner's Greivance Committee. On or about December 1, Bonomi telephoned Rogers and inquired as to who was the unnamed commissioner and whether he was a lawyer, because the newspaper article did not so indicate. Rogers told Bonomi that the commissioner mentioned was Michael Freyberg and that he was a lawyer and there was another lawyer involved who had been granted immunity, but he could not disclose his name at that time (Bonomi, 95-96). Subsequently, on January 30, 1970, two months later, Bonomi saw an article in The New York Times which dealt with the same aforementioned investigation and, in that article, respondent's name was mentioned; he then opened an office card on the respondent so that an appropriate inquiry could be made (Bonomi, 99-101).

It is the contention of the petitioner, in addition to the denial that the alleged promise was made by Rogers, that even on the basis of these facts, and Landsman's aforesaid testimony, it cannot be claimed that Rogers initiated or referred this matter to the petitioner.

Returning now to further consideration regarding the alleged promise. Whereas the promise made to respondent's attorneys and to respondent that respondent would be granted immunity was personally and definitely confirmed by Rogers and put on the record of the proceedings of the grand jury even before respondent gave any testimony, there is nothing at all in writing or in any other convincing from to show to my satisfaction that Rogers had, in fact, made the alleged promise here in question. As stated above, respondent, himself, never heard Rogers express the promise, nor did he ever attempt to obtain confirmation from Rogers about it, particularly since he claims to have been so concerned about that problem; and Landsman's testimony at the hearings is not substantiated by his own written memorandum.

There is one further item. The evidence shows that on April 27, 1973, at the request of one of respondent's prior attorneys, Rogers wrote a letter to Bonomi in which, among other things, he advised that, "It was in part due to Mr. Olitt's extensive cooperation that the District Attorney secured indictments against Ralph Elyacher and Melvin Kaufman." He also said he was calling these facts to Bonomi's attention for "whatever action you deem appropriate." (Respondent's Exhibit "11") This was in accord with the usual practice in the district attorney's office of sending such a letter to the Grievance Committee when an attorney has cooperated in an investigation (Rogers -- cross, 230).

Rogers also testified that when he received such request from respondent's then attorney, according to his recollection, the said attorney made no reference to any promise which Rogers allegedly made to respondent (Rogers -- redirect, 240).

CONCLUSION

In view of the foregoing, I find that the respondent has failed to prove by a fair preponderance of credible evidence that the District Attorney of New York County, by his assistant, Frank J. Rogers, made the promise to respondent or his attorneys as is alleged herein. Therefore, the ruling in the Palermo case is not available to respondent.

RECOMMENDATION

This has been a very long and unusual case. It is now 11 years since the underlying events took place. It is 9 years since these events first came to light. The respondent and his family have undoubtedly suffered great mental anguish during this entire period. In addition, this has been a severe drain on his financial resources by way of loss of business as well as actual expenditures of approximately $100,000 for legal fees, thus practically depleting all of his and his wife's life savings.

In my judgment, the underlying reason for respondent's entanglement in the present situation was his overriding desire to please an important client and thereby enhance and improve his professional relationship with the client. Unfortunately, this so warped his judgment that he failed to see the hazards of his undertaking. For this he has already paid an enormous price and penalty.

Although I have stated as my view that the delay herein (to which both parties contributed) did not estop petitioner from pursuing these proceedings, I believe that the long time elapsed is a mitigating factor that should be considered by the Court on the question of possible discipline of the respondent. As this Court said in the Matter of Shea, 274 App. Div. 18 (1st Dept., 1948) at page 19:

> "These charges relate to matters occurring more than ten years ago, and were apparently largely the result of an opinion honestly, even though mistakenly, held. The investigations arising out of the charges made had been pending for many years. The protracted pendency of the proceedings, the publication and humiliation connected therewith have been in themselves a severe form of punishment."

Even though circumstances are different, the principle expressed above is pertinent here.

Furthermore, the District Attorney of New York County, in recognition of the meaningful assistance by the respondent, wrote a letter to petitioner's chief counsel, advising him of respondent's "extensive cooperation."

Finally, it appears from the testimony presented by respondent and from a number of witnesses whom he called, that he has conducted himself honorably, as an attorney, and has rendered some useful legal services, charitable and pro bono, which reflect favorably upon himself as well as the legal profession.

For these reasons, I respectfully recommend that due consideration for leniency be extended to the respondent.

Respectfully Submitted,

JACOB GRUMET
Referee

New York
Dated: October 25, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-192

J. JEROME OLITT,

Petitioner,

—against—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In the

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Statement of the Case

Respondent, The Association of the Bar of the City of New York, files this brief in opposition to petitioner's Petition for a Writ of Certiorari.

ARGUMENT

The Petition Should Be Denied

1. The first Question Presented refers to no possible error by the New York courts. The New York courts did not bar petitioner from access to the federal courts.

Petitioner's federal action to enjoin the state courts, referred to at petition p. 5, was dismissed by the United States District Court, the dismissal was affirmed by the

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Petitioner's federal action to enjoin the state courts, referred to at petition p. 5, was dismissed by the United States District Court, the dismissal was affirmed by the

United States Court of Appeals, and this Court denied certiorari. *Anonymous* v. *Association of the Bar,* 515 F 2d 427 (2d Cir. 1975), certiorari denied, 423 U.S. 863 (1975).

2. Petitioner's second Question Presented is insubstantial and does not merit review.

The New York Court of Appeals, in *Matter of Anonymous,* 41 NY 2d 506 (1977), gave full, careful and correct consideration to the question and decided it the other way. *Spevack* v. *Klein,* 385 U.S. 511 (1967), has no bearing. It decided that an attorney could not be disciplined for invoking the Fifth Amendment. It did not decide that immunized testimony could not be used in a disciplinary proceeding.

3. Petitioner's third Question Presented is based on a flagrant misstatement of the record.

Petitioner says that he "received a promise from the assistant district attorney . . . that he would not initiate or refer the . . . matter to the Committee on Grievances . . ." and that this alleged promise was violated. (petition, p. 4). However, the Referee found, after a full trial of the matter, "that the respondent has failed to prove by a fair preponderance of credible evidence that the District Attorney of New York County, by his assistant, Frank J. Rogers, made the promise to respondent or his attorneys as is alleged herein." (petition, p. 70).

4. The fourth Question Presented raises no Fourteenth Amendment question.

The New York Criminal Procedure Law § 190.25.5 mandates the secrecy of grand jury proceedings but permits their disclosure upon application and "upon written order of the court." The New York Court of Appeals has held

that an application to disclose grand jury proceedings in the public interest may be made and granted without notice to the witnesses whose testimony will be disclosed. *People* v. *DiNapoli,* 27 NY 2d 229 (1970).

New York's discretion in this area is not restricted by the Fourteenth Amendment which does not mandate the secrecy of state grand jury proceedings; nor, where they are made secret by state statute, does it mandate notice to the witnesses involved of an application under state statute for disclosure.

5. The fifth Question Presented raises no Sixth or Fourteenth Amendment questions.

The Sixth Amendment refers only to criminal trials, which a disciplinary proceeding is not. *Matter of Anonymous,* 41 NY 2d 506 (1977) (*supra*).

The requirement of a speedy trial, even in criminal cases, applies to the period between the formal charge (by indictment or otherwise) and the trial, not to the period of time occupied by the pre-formal charge investigation.

Respondent learned of petitioner's matter in January 1970 and investigated for three years, not notifying petitioner of its investigation until January 1973. It served formal charges May 31, 1973 and the trial was held June 21, 1973. (petition, pp. 4-5, 59-61).*

Petitioner, therefore, in fact received a very speedy trial.

If petitioner's fifth Question Presented is considered a due process rather than a speedy trial question—on the basis of the claim of laches—the short answer is that the Referee found, after a full trial of the issue: "I do not

* All further delays resulted from deliberate delaying moves by petitioner. (petition, pp. 5-7, 60)

believe that the respondent has been prejudiced to the extent that these proceedings should be barred." (petition, p. 61).

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 16, 1978

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REPLY BRIEF OF PETITIONER IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF OF PETITIONER IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Preliminary Statement

Petitioner, J. JEROME OLITT, files this reply brief in further support of his Petition for a Writ of Certiorari.

Argument

RESPONDENT HAS FAILED TO RAISE ANY REASON FOR THE DENIAL OF THE PETITION

A. RESPONDENT'S CLAIM THAT THE NEW YORK COURTS DID NOT BAR PETITIONER FROM ACCESS TO THE FEDERAL COURTS IS ERRONEOUS.

Following the resolution of the state issues by the Referee, the Grievance Committee moved to confirm the Referee's Report and to impose discipline. The Petitioner cross-moved to stay the imposition of discipline pending his return to the Federal District Court for the resolution of his federal constitutional claims, pursuant to that provision of his Answer to the Petition which expressly reserved his right to litigate his federal questions in the Federal Court.

The Referee's Report was confirmed in all respects, the cross-motion for a stay denied, and Petitioner was suspended from the practice of law for three (3) years.

Accordingly, the New York Courts barred Petitioner from access to the Federal Court prior to the imposition of discipline upon him.

B. RESPONDENT'S CLAIM THAT PETITIONER'S FIFTH AMENDMENT QUESTION IS INSUBSTANTIAL AND DOES NOT MERIT REVIEW IS ERRONEOUS.

The fact that the Courts of the State of New York disagree with Petitioner's contention that his rights under the Fifth Amendment of the United States Constitution were violated by the use of his

immunized Grand Jury testimony as part of the case and chief against him in the State Court disciplinary proceeding is a bar to this Court's interpretation of the Petitioner's Fifth Amendment rights.

This point presents a novel question yet to be decided by this Court. This case has already stated in Matter of Ruffalo, 20 L.Ed.2d. 1436 and the Second Circuit has likewise held in Erdmann v. Stevens, 458 F.2d. 1211 that the practice of law is a privilege, and once granted it may not be taken away without due process of law. Additionally, these cases also stand for the principle that attorney disciplinary proceedings are quasi-criminal in nature.

Petitioner had received a transactional immunity in connection with this testimony before the Grand Jury by a State Officer expressly authorized to commence attorney disciplinary proceedings. Furthermore, this Officer promised that he would not initiate or refer the matter to the Grievance Committee.

Such a state of facts presents to this Court, we believe, for the first time, a question as to whether immunized Grand Jury testimony may be used against an attorney in a State Court disciplinary proceeding.

Petitioner's claim of the violations of his privilege against self-incrimination raises an issue similar to a case in which this Court granted review (77-1489, New Jersey v. Portash, 6/12/78). In that case, the question was whether the privilege against self-incrimination was violated by a decision allowing prosecutors to use immunized Grand Jury testimony

to impeach a defendant's trial testimony. The New Jersey Superior Court, Appeals Division, ruled that it is and reversed a conviction after an extortion defendant decided not to testify in his own behalf because the Trial Court intended to allow the impeachment.

C. RESPONDENT'S CLAIM THAT THE QUESTION OF THE "PROMISE" IS BASED UPON A MISSTATEMENT OF RECORD IS LIKEWISE ERRONEOUS.

In claiming that Petitioner's Question Presented is based on a flagrant misstatement of record, the Respondent states that the State Court Referee, after a full trial of the matter, found that the Respondent had failed to prove by a fair preponderance of the credible evidence that the District Attorney of New York County, by its Assistant, Frank J. Rogers, made the promise to Petitioner or his attorneys that he would not initiate or refer the matter to the Grievance Committee. However, as explained carefully in the Petition, the Petitioner relies upon his right to have his federal claims determined by a Federal Court. How the facts are found often dictates the decision of federal claims. Petitioner claims that he has been denied the opportunity of a Federal Court's role in formulating the record and that he may not be unwillingly deprived of a Federal Court's determination of his federal claims.

D. PETITIONER'S FOURTH QUESTION PRESENTS A GRIEVOUS DUE PROCESS ISSUE.

Petitioner claims that Section 190.25.5 of the New York Criminal Procedure Law, which permits

the disclosure of Grand Jury minutes upon application, is unconstitutional to the extent that such application to the Court may be made in an ex-parte manner, without notice to the witnesses who testified before the Grand Jury, and without affording to those witnesses an opportunity to be heard. The New York State's holding in People v. DiNapoli, 27 N.Y.2d. 229 (1970) to the contrary is not binding upon this Court. Such flagrant lack of due process violates this Court's decisions which clearly define that at a minimum, due process requires notice of the application and an opportunity to be heard in opposition.

E. PETITIONER'S FIFTH QUESTION PRESENTS ISSUES NEVER CLEARLY DEFINED BY THIS COURT.

In his fifth question, the Petitioner claimed that the State Court's denial of Petitioner's claim of extreme prejudice (that the witnesses died, etc.) by the virtue of the unjustified and unreasonable prosecutorial delay in the prosecution of the State Court proceeding is contrary to this Court's decision in the Matter of Ruffalo, 20 L.Ed.2d. 1436; Barker v. Wingo, 407 U.S. 514; Klopher v. North Carolina, 386 U.S. 213; and Spevack v. Klein, 386 U.S. 511. Respondent argues that the Sixth Amendment refers only to criminal trials. Petitioner argues that disciplinary proceedings are quasi-criminal in nature and to that extent Sixth Amendment rights apply.

Furthermore, even if Sixth Amendment rights did not apply, laches should act to bar the proceeding.

The Appellate Division of New York Supreme Court, itself, in its formal opinion, included the following paragraph:

> "The petitioner learned of respondent's misconduct in January, 1970 and began proceedings in 1973."

Accordingly, the three (3) year delay went totally unexplained.

CONCLUSION

Petitioner respectfully prays that for the reasons set forth in his Petition, and for the reasons set forth hereinbefore, his Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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DATED: New York, New York

August 24th, 1978.